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No. 87-681

Supreme Court, U.S.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

GARY RAWSON,

Petitioner,

VS.

SEARS, ROEBUCK AND COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

CHARLES G. BAKALY, JR.

(Counsel of Record)

DEBRA L. BOYD

JOANNE O'DONNELL

O'MELVENY & MYERS

400 South Hope St.

Fifteenth Floor

Los Angeles, CA 90071-2899

(213) 669-6000

Counsel for Respondent

Sears, Roebuck and Co.

Of Counsel

ANN KANE SMITH

SEARS, ROEBUCK AND CO.

600 Sierra Madre Villa Ave.

Pasadena, CA 91107-2076

(818) 351-3351

GREGORY A. EURICH

CHARLES M. JOHNSON

HOLLAND & HART

555 Seventeenth St.

Suite 2900

Denver, CO 80201

(303) 295-8000

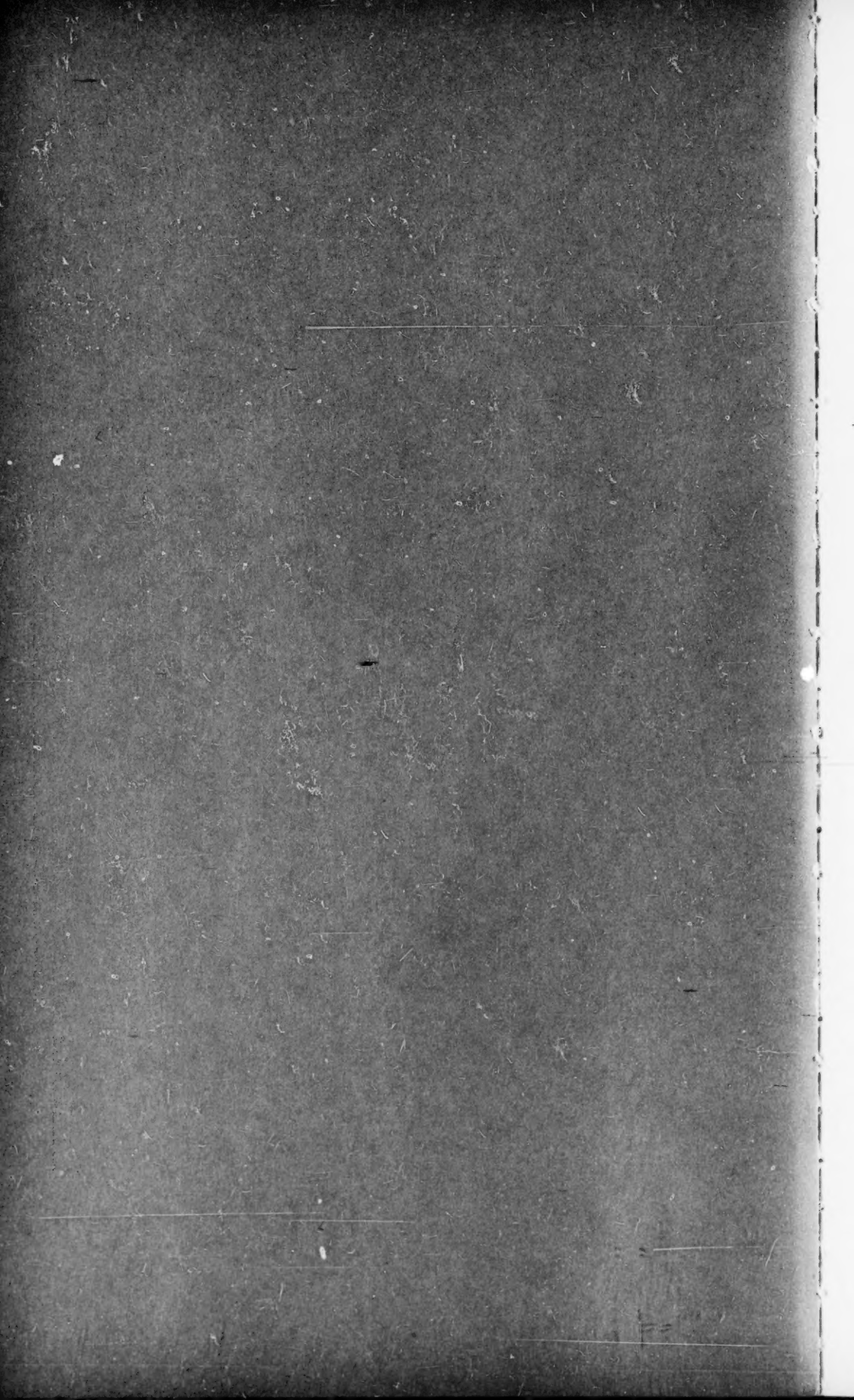


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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Defendant-respondent Sears, Roebuck and Co. ("Sears")¹ opposes the petition for writ of certiorari filed by plaintiff-petitioner Gary Rawson ("Rawson"). Jurisdiction in the trial court was grounded in diversity of citizenship and the sole issue decided by the Tenth Circuit Court of Appeals was a matter of state law. Neither a federal question nor any other significant legal issue is presented in the petition.

¹A listing of Sears' corporate affiliations and subsidiaries, other than wholly-owned subsidiaries, is attached as an appendix to this brief, in compliance with Supreme Court Rule 28.1.

STATEMENT OF THE CASE

In his petition, Rawson sets forth a "Statement of the Case" which purports to relate the facts and procedural history of the instant matter. Sears respectfully submits the following statement of the case, which describes the seminal history of this matter devoid of Rawson's emotional diatribe, his misstatement of the record and his unsupported and unsupportable statements of "fact."

Rawson, a former Sears employee and store manager who was terminated at age 59, filed this action in July 1981 in Colorado state court. (A. 2a-3a.)² Sears removed the case to the trial court, where all but one of Rawson's eleven claims were dismissed. (A. 3a-4a.) Rawson never appealed the dismissal of his claims but relied instead on his single remaining claim for damages for age discrimination in employment under Colorado Revised Statutes ("C.R.S.") § 8-2-116. Notwithstanding that the sole remedy for violation of C.R.S. § 8-2-116 is a penal fine (see C.R.S. § 8-2-117), and absent any showing of legislative intent to provide a civil remedy thereunder, the trial court nonetheless determined that Rawson could pursue a private civil action for age discrimination under that statutory provision. (A. 116a.) Until the trial court's decision in this case, no Colorado court, nor any federal court applying Colorado law, had determined that the Colorado legislature intended to create a private right of action for age discrimination based on C.R.S. § 8-2-116, and in fact, since the statute's enactment in 1903, no reported decision had even mentioned the provision. (A. 5a.)

²"A. 2a-3a" refers to pages 2a-3a of the record set forth in the appendix filed concurrently with the petition for writ of certiorari. Similar references will be used throughout this brief.

Trial was bifurcated in this action. The jury returned a verdict against Sears as to liability on January 30, 1984. (A. 175a.) The trial court denied Sears' motions for Judgment Notwithstanding the Verdict and for New Trial and awarded Rawson costs in the amount of \$11,096.54. (A. 8a, 152a-171a.) Sears filed a timely cost appeal.

On July 19, 1985, a second jury assessed compensatory damages of approximately \$844,910 for lost wages and benefits, \$5,000,000 for pain and suffering and \$10,000,000 in punitive damages. (A. 175a-176a.) The trial court denied Sears' post-trial motions in which Sears contended that the evidence did not support punitive damages and that both the compensatory and punitive damages awards were excessive and unreasonable. (A. 172a-209a.) The trial court awarded Rawson prejudgment interest in the amount of \$3,251,585.01, awarded post judgment interest, and entered judgment in the amount of \$19,096,495.01 on August 28, 1985. (A. 8a, 209a.) Sears filed a timely notice of appeal.

Recognizing that conflict arose in both the federal district courts and state trial courts in Colorado after the initial *Rawson* decision, the Tenth Circuit conducted an "independent inquiry" into the proper interpretation of state law and determined that there was neither an express nor implied private right of action for violation of C.R.S. § 8-2-116. (A. 1a-69a.) Rawson's request for rehearing and rehearing en banc was denied by the Tenth Circuit. (A. 102a-103a.)

SUMMARY OF ARGUMENT

This case presents no issue which would warrant granting the petition for writ of certiorari. Jurisdiction in the district court was based on diversity of citizenship and the only issue decided by the Tenth Circuit was a matter

of state law — whether a 1903 Colorado statute prohibiting age discrimination in employment, which set forth only criminal penalties and which has been repealed, provided a private right of action for age discrimination for Rawson. The Tenth Circuit Court of Appeals resolved the conflict among the federal district courts and state trial courts in Colorado by finding that the Colorado legislature intended no private right of action for age discrimination in employment. That decision reversed the trial court's judgment and jury award against Sears. The Tenth Circuit's ruling was based on long-standing and unequivocal Colorado case authority, analogous authority from other jurisdictions and recognized canons of statutory construction which had been ignored by the trial court. It was soundly reasoned and provides no basis for scrutiny by this Court.

REASONS FOR DENYING THE PETITION

Despite Rawson's attempt to raise new issues on appeal (his alleged "absolute" right to recover for any alleged injury under the Colorado constitution), this case is a straightforward matter involving the interpretation of Colorado criminal statutes enacted in 1903, proscribing age discrimination in employment and establishing a \$250 maximum misdemeanor penalty. C.R.S. §§ 8-2-116 and 117. This Court has repeatedly expressed its reluctance to interfere in the interpretation of local laws (*see, e.g., Butner v. United States*, 440 U.S. 48 (1979); *Bishop v. Wood*, 426 U.S. 341 (1976)), and this case provides no justification for doing so.

Supreme Court Rule 17 sets forth a detailed list of reasons for granting review on writ of certiorari. Although the grounds set forth in Rule 17 are not an exhaustive measure of the Court's discretion to grant

review, review is granted "only when there are special and important reasons therefor." Such significance may attach when a federal court of appeals has rendered a decision in conflict with another federal court of appeals, when a federal court of appeals has decided a federal question in conflict with a state court of last resort, when a federal court of appeals has markedly departed from accepted judicial practice, when a state court of last resort has decided a federal question in a manner which conflicts with the decision of another state court of last resort or a federal court of appeals, or when a state or federal court of appeals has decided an important question of federal law which should be settled by this Court or which is in conflict with pertinent decisions of this Court. See Supreme Court Rule 17.1(a)-(c).

None of the enumerated reasons for granting review obtains in this case, nor are there any other "special and important reasons" for granting review on writ of certiorari. Rawson's petition certainly presents no federal question, nor is the Tenth Circuit's decision in conflict with the decision of any other federal court of appeals or state court of last resort. Jurisdiction in the district court was based on diversity of citizenship and Rawson's claim at trial was based on a state statute — C.R.S. § 8-2-116. The Tenth Circuit's decision turns entirely on the interpretation of that state statute, based on Colorado case authority, analogous authority from other jurisdictions, and canons of statutory construction.

Rawson's belated attempt to invoke the Colorado constitution in his petition likewise raises no issue of federal law. And Rawson's assertion that the Colorado constitution "guarantees" a remedy for any injury is sheer nonsense. The Colorado Supreme Court has itself precluded recovery under a statute where, as here, the Colorado

legislature has prescribed remedies for violation of the statute or the statute recognizes rights or duties in derogation of the common law. *See, e.g., Continental Title Co. v. District Court*, 645 P.2d 1310 (Colo. 1982) (no recovery for handicap discrimination outside of remedies specified in Colorado's Antidiscrimination Act); *Board of County Comm'rs v. Pfeifer*, 190 Colo. 275, 546 P.2d 946 (1976) (statute granting Board of County Commissioners equitable powers to enjoin sale of land before final plat approval does not include power to set aside conveyance of land); *Quintano v. Industrial Comm'n*, 178 Colo. 131, 136, 495 P.2d 1137, 1139 (1972) (injured worker could not maintain private damages action against Colorado Industrial Commission for violation of statute charging Commission with workplace safety inspection). *See also Holter v. Moore*, 681 P.2d 962 (Colo. Ct. App. 1983) (no private action for violation of real estate licensing provision when legislature limited remedies to discipline and criminal fines); *Silverstein v. Sisters of Charity*, 38 Colo. App. 286, 559 P.2d 716 (1976) (remedy for handicap discrimination limited to criminal penalties specified in statute). The Colorado constitution simply guarantees equal access to the courts for *cognizable* wrongs, and Rawson has no *cognizable* claim.

Rawson repeatedly asserts that the Tenth Circuit deprived him of his "common law rights" which the trial court purportedly recognized. In passing, Rawson then urges that the Tenth Circuit thereby violated the Fifth Amendment of the United States Constitution. The argument is specious. First, the trial court did not create or recognize a common law right of action for age discrimination; in fact, it dismissed Rawson's common law claims. (A. 136a, 151a.) According to repeated rulings by the trial court, a private right of action for age discrimination was *implied* in C.R.S. § 8-2-116. (A. 108a-116a, 173a.)

Rawson has raised the issue of a "common law" age discrimination claim for the first time in his petition. Second, it is well established that the duty not to discharge an employee because of age is purely a creature of statute and is in *derogation* of the common law. *See, e.g., Strauss v. A.L. Randall Co.*, 144 Cal. App. 3d 514, 520, 194 Cal. Rptr. 520, 524 (1983); *accord Fawcett v. G.C. Murphy & Co.*, 46 Ohio 2d 245, 348 N.E.2d 144 (1976); *Johnson v. United States Steel Corp.*, 348 Mass. 168, 202 N.E.2d 816 (1964) (superseded by statute). Third, if, as Rawson seems to suggest, reversal of a damage award on appeal is an unconstitutional taking of property in violation of the Fifth Amendment, appellate review would become meaningless. Rawson ignores the simple fact that he has been accorded "due process of law" throughout several years of litigation and appeal.

Moreover, the Tenth Circuit's decision was sound. The Tenth Circuit's ruling was based on long-standing Colorado case authority in which both the Colorado Supreme Court and state appellate courts have refused to expand remedies prescribed by statute when the statute establishes rights or duties unknown at common law and specifies remedies for its violation. *See, e.g., Silverstein v. Sisters of Charity*, 38 Colo. App. 286, 559 P.2d 716 (1976) (anti-handicap discrimination statute established rights and duties unknown at common law; remedies limited to those specified in statute); *accord Agnello v. Adolph Coors Co.*, 695 P.2d 311 (Colo. App. 1984). The statute in question, C.R.S. § 8-2-116, provided rights unknown at common law and specified criminal penalties for its violation, thereby making it clear to the Tenth Circuit that the Colorado Supreme Court would find neither an express nor an implied cause of action under the statute. The Tenth Circuit also based its decision on established principles of statutory construction finding that C.R.S. §§ 8-3-

108, and 8-3-121, which together permit recovery for damages for the commission of a crime or misdemeanor in disputes over employment relations, and on which the trial court relied, have no applicability outside of the management/union context.

Rawson has suggested, mistakenly, that Supreme Court precedent requires federal courts of appeals to adopt the "local judge rule," and defer to the trial court's interpretation of state law. None of Rawson's cited cases suggest that this Court has mandated such deference by federal courts of appeals. On the contrary, this Court has recognized that federal appellate review of a trial court's interpretation of state law is not a *pro forma* exercise. See *Bernhardt v. Polygraphic Co.*, 350 U.S. 198, 209 (1956) (Frankfurter, J., concurring).

Moreover, as the majority in the Tenth Circuit decision took pains to point out, the Tenth Circuit did not "abandon" the local judge rule. The majority adhered to a recognized exception to that rule, triggered when other federal district court judges sitting in the same state disagree with the ruling in question.³ This is neither a departure from Tenth Circuit practice (see, e.g., *Maughan v. SW Servicing, Inc.*, 758 F.2d 1381, 1384 n.2 (10th Cir. 1985); *McGehee v. Farmers Ins. Co.*, 734 F.2d 1422, 1424-25 (10th Cir. 1984)), nor a departure from other circuit courts' practices. See, e.g., *Big River Grain, Inc. v. SBA*, 718 F.2d 968 (9th Cir. 1983); *Luke v. American Family Mutual Ins. Co.*, 476 F.2d 1015 (8th Cir. 1972), cert.

³As the Tenth Circuit noted, since the initial *Rawson* decision, federal district courts in Colorado and state trial courts have divided on the issue of whether an express or implied private right of action is contained in C.R.S. § 8-2-116. (A. 10a-11a, 30a-33a.) Thus, the Tenth Circuit properly concluded that this case is a "wholly inappropriate vehicle for testing the 'local judge' rule." (A. 15a.)

denied, 414 U.S. 856 (1973). Nor did Rawson persuade the entire Tenth Circuit that the panel had departed from an established "rule": the entire circuit denied Rawson's request for rehearing en banc. (A. 102a-103a.)

Rawson's request that this Court certify the issue to the Colorado Supreme Court is an unseemly attempt to forum shop and a transparent effort to get another "bite at the apple." Rawson fails to note that he adamantly opposed certification when Sears requested it before the trial court in 1983. The trial court denied Sears' request for certification. Rawson continued to oppose certification when the Tenth Circuit requested that the parties brief the issue of certification on appeal.⁴ (A. 6a n.4.) In its discretion, the Tenth Circuit did not certify the question to the Colorado Supreme Court: the Tenth Circuit noted in its decision that "there is adequate authority from Colorado state courts to guide our deliberations in this case." (A. 14a n.6.) Unhappy with the Tenth Circuit's resolution of the state law issue, Rawson now wants to relitigate this matter in a forum he twice argued should be foreclosed to the parties. Rawson's eleventh hour about-face has come after more than six years of litigation, and this Court should reject his request that the Court override both the trial court's and court of appeals' respective decisions to decide the state law question rather than certify it to the state supreme court. The trial court and court of appeals accepted their rightful responsibility in a diversity action to decide issues of state law, and their exercise of discretion should be respected. *Cf. Meredith v. Winter Haven*,

⁴Sears also opposed certification on appeal because lengthy litigation had already transpired, certification would entail further delay and Sears had raised numerous other non-certifiable issues in the appeal.

320 U.S. 228 (1943) (federal courts have duty to decide questions of state law in diversity cases).

Finally, the Colorado statute in question has little significance beyond the instant case. The Colorado legislature has effectively settled the issue for all future cases by its repeal of C.R.S. § 8-2-116, and its inclusion of age discrimination in Colorado's Antidiscrimination Act, C.R.S. §§ 24-34-301 *et seq.* (A. 5a-6a.) The Colorado Supreme Court has made it clear that remedies under the Antidiscrimination Act are prescribed by statute and no civil remedies, outside of those afforded by the Act, may be implied. *Continental Title Co. v. District Court*, 645 P.2d 1310 (Colo. 1982). Thus, only a handful of cases could be affected by this Court's review of the Tenth Circuit's decision.

CONCLUSION

Rawson has raised no federal question in his petition nor any other "special and important" reason to justify granting review of the Tenth Circuit's decision in this case. Accordingly, the petition should be denied.

Dated: November 20, 1987.

Respectfully submitted,

CHARLES G. BAKALY, JR.

(Counsel of Record)

DEBRA L. BOYD

JOANNE O'DONNELL

O'MELVENY & MYERS

400 South Hope Street

Fifteenth Floor

Los Angeles, CA 90071-2899

(213) 669-6000

Counsel for Respondent

Sears, Roebuck and Co.

Of Counsel

ANN KANE SMITH

SEARS, ROEBUCK AND CO.

600 Sierra Madre Villa Ave.

Pasadena, CA 91107-2076

(818) 351-3351

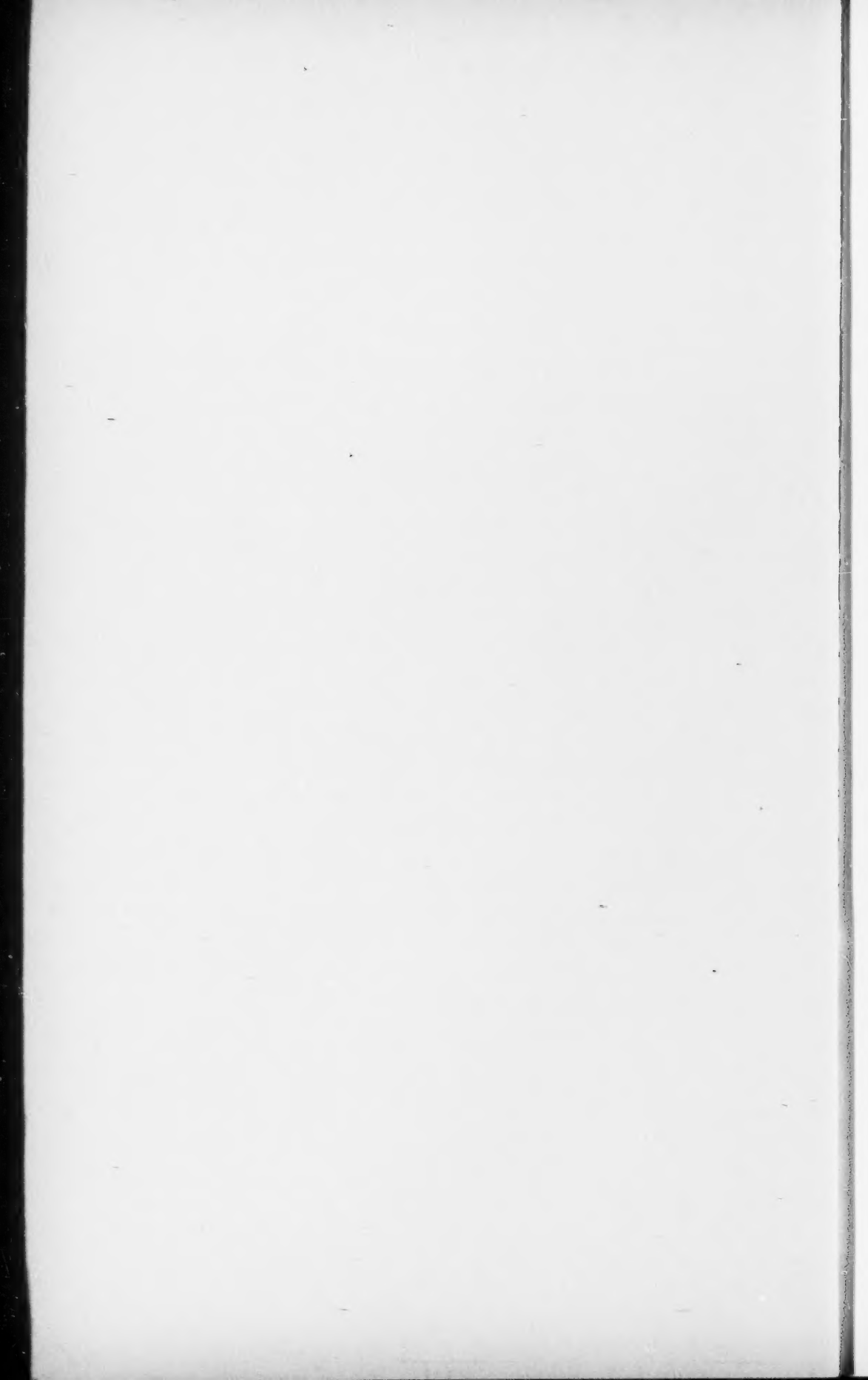
GREGORY A. EURICH

CHARLES M. JOHNSON

HOLLAND & HART

555 Seventeenth St., Suite 2900

Denver, CO 80201



APPENDIX

RULE 28.1 STATEMENT

Sears, Roebuck and Co.'s subsidiaries and affiliates, other than wholly-owned subsidiaries and affiliates, are as follows:

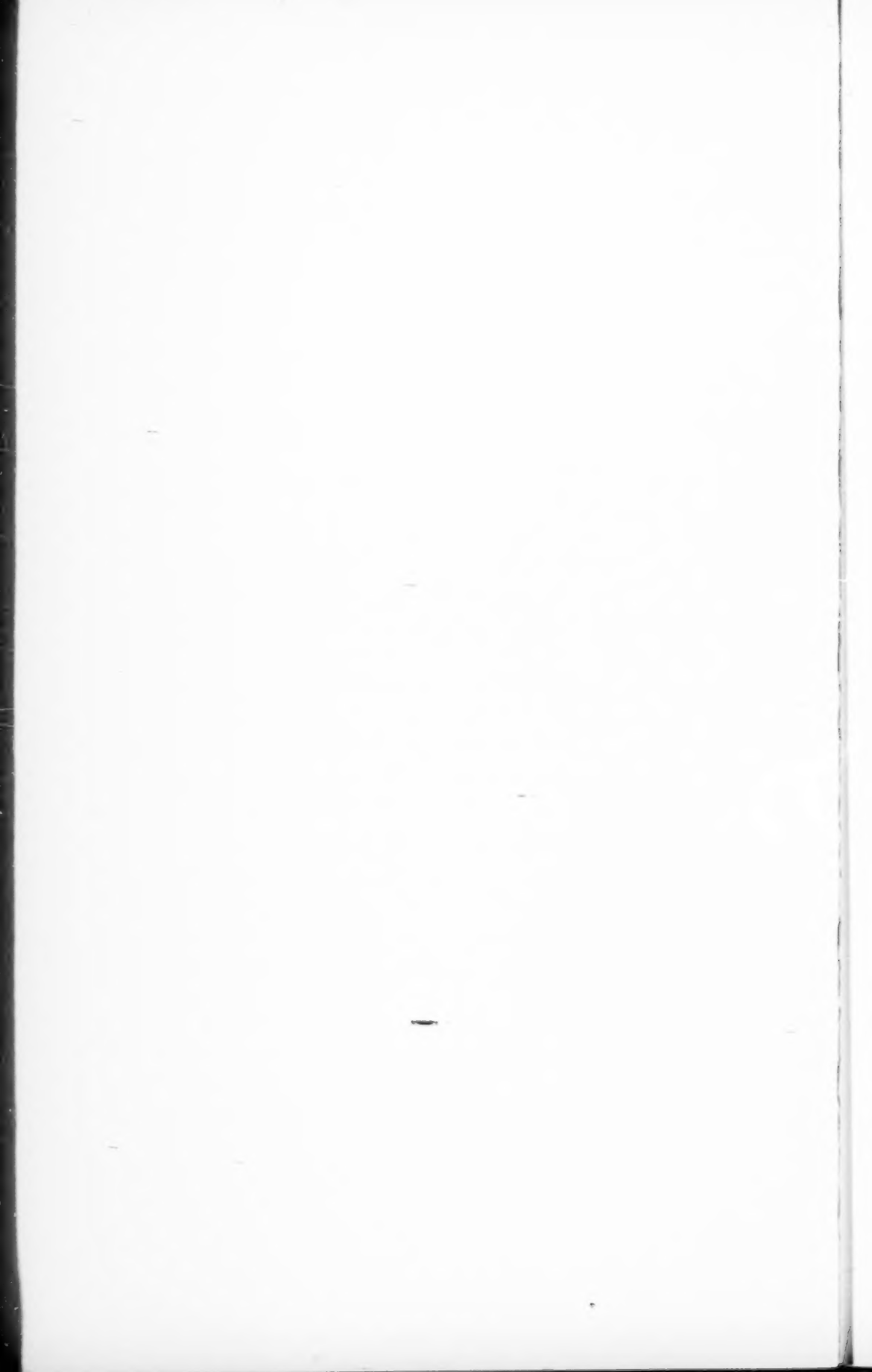
Allstate Automobile & Fire Insurance Company Limited	(Japan)
Allstate Insurance Company of Canada	(Canada)
Allstate Life Insurance Company of Canada	(Canada)
Allstate Service Stations Limited	(Canada)
American Rehab Products Inc.	(U.S.A.)
Angrignon	(Canada)
BOWO, S.A.	(Costa Rica)
Burkhart — AS 1983 Limited Partnership	(U.S.A.)
Carrefour Richelieu Realities Limited	(Canada)
Chatham Centre Mall Limited	(Canada)
Citrus Park Venture	(U.S.A.)
Clearview Mall Company	(U.S.A.)
Colony Gas Gathering — A Ltd. Partnership	(U.S.A.)
Contill Realty Limited	(Canada)
Cranberry Mall Company	(U.S.A.)
Dean Witter Futures Limited	(U.K.)
Dean Witter Reynolds International S.A.	(France)
Dean Witter Reynolds (Lausanne) S.A.	(Switzerland)
Dean Witter Reynolds Limited	(U.K.)
Dean Witter Reynolds S.A.	(Switzerland)
Dean Witter Reynolds S.p.A	(Italy)
Fallowfield Developers, Ltd.	(U.S.A.)
Fiesta Mall Venture	(U.S.A.)

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492398 Ontario Limited	(Canada)
Gas Resources, Ltd., A Partnership in Commendam	(U.S.A.)
H-D Lakeland Mall J.V.	(U.S.A.)
HDXR Associates	(U.S.A.)
H-L Land Improvement Venture	(U.S.A.)
H-L Mall Venture	(U.S.A.)
H-L Office Venture	(U.S.A.)
Kelfor Holdings Limited	(Canada)
Kerrybrooke Developments Ltd.	(Canada)
Kerrytor Limited	(Canada)
Kingsway Imports Ltd.	(Canada)
Lake Hodges Development Co.	(U.S.A.)
Lakepointe Joint Venture	(U.S.A.)
Lakeside/Nov. Associates	(U.S.A.)
Landcaster Mall Associates	(U.S.A.)
Les Estimations Gilles Bordeleau Inc.	(Canada)
Mercer Mall Company	(U.S.A.)
Montorlab Inc.	(Canada)
New Park Associates	(U.S.A.)
North 400 Venture	(U.S.A.)
134245 Canada Ltd.	(Canada)
Quetor Realty Ltd.	(Canada)
Regbrooke Limited	(Canada)
Regional Shopping Centres Limited	(Canada)
Regional Shopping Centres (Canada) Lim- ited	(Canada)
Ridgwell, Fox and Partners (Underwriting Management) Limited	(U.K.)
Sanguine/A Anadarko, Ltd.	(U.S.A.)
Sears Acceptance Company Inc.	(Canada)
Sears Canada Inc.	(Canada)
Sears First Chicago Trading Company	(U.S.A.)
Sears Holdings Limited	(Canada)

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Sears Limited	(Canada)
Sears (1978) Limited	(Canada)
Sears Properties Inc.	(Canada)
Sears, Roebuck de Mexico, S.A. de C.V.	(Mexico)
Sears, Roebuck Pty. Limited	(Australia)
Sears, Roebuck Servicios de Chile Limitada	(Chile)
Sears, Roebuck S.A. Commercial e Industrial	(Argentina)
Sears-SGV Services Limited	(Philippines)
Sears World Trade Commercial Ltda.	(Brazil)
Seibu Allstate Life Insurance Company, Ltd.	(Japan)
S.L.H. Transport Inc.	(Canada)
St. Laurent Shopping Centre Ltd.	(Canada)
Simon Homart San Antonio Partnership	(U.S.A.)
Tempo-GP, Inc.	(U.S.A.)
The Mall at Buckland Hills Partnership	(U.S.A.)
The Woodlands Mall Associates	(U.S.A.)
Traflow Shipping Services Ltd.	(U.K.)
212552 Ontario Limited	(Canada)
Vantor Realty Ltd.	(Canada)
Westgate Associates	(U.S.A.)
Wintor Realty Ltd.	(Canada)
Woodfield Associates	(U.S.A.)
Xerox Centre Associates	(U.S.A.)



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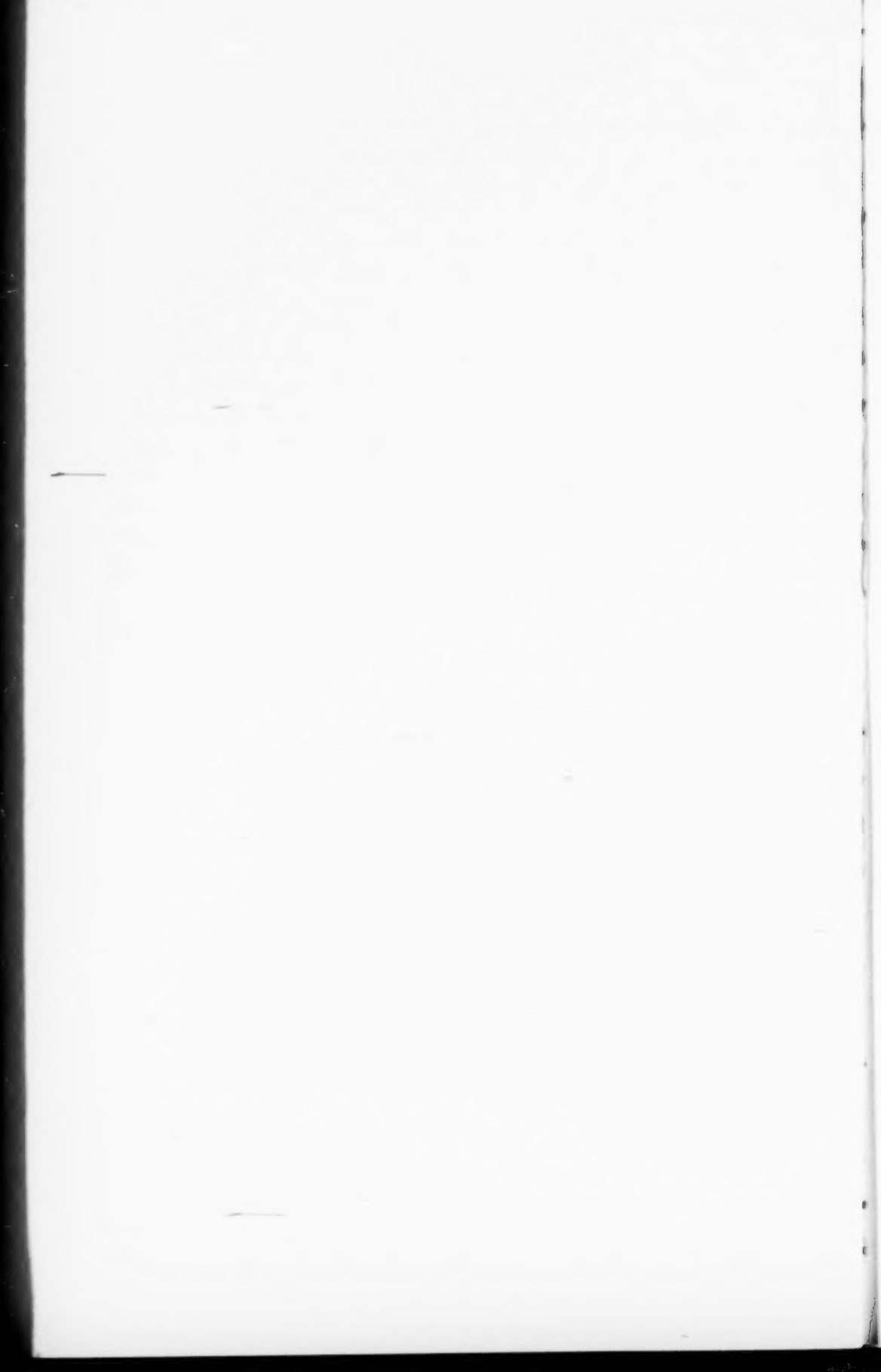
I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On November 20, 1987, I served the within Brief in Opposition in re: "Gary Rawson vs. Sears, Roebuck and Company" in the United States Supreme Court, October Term 1987, No. 87-681; on the parties in said action, by placing three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

James A. Carleo
620 S. Cascade, Suite 102
Colorado Springs, Colorado 80903

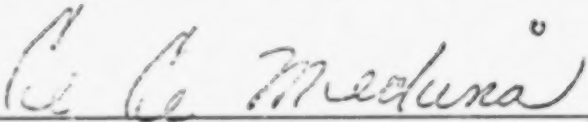
Thomas M. DeNiro
620 S. Cascade, Suite 102
Colorado Springs, Colorado 80903

All Parties required to be served have been served.



I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on November 20, 1987, at Los Angeles, California.

A handwritten signature in cursive script, reading "Ce Ce Medina", is written over a horizontal line. The signature is fluid and stylized, with the first two initials "Ce Ce" being more prominent than the last name "Medina".

CE CE MEDINA